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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARYLIN AVELAR, Defendant and Appellant.	B205287 (Los Angeles County Super. Ct. No. NA065977)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bradford L. Andrews, Judge. Affirmed with modifications.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

On July 7, 2005, defendant, Marylin Diaz Avelar, pled nolo contendre to charges of methamphetamine sale (Health & Saf. Code, 11379, subd. (a)) and cocaine possession for sale. (Health & Saf. Code, 11378.) Defendant appeals from the subsequent probation revocation which resulted in a state prison sentence. Defendant argues the trial court improperly found her in violation of her probation. We affirm with modifications.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On October 28, 2005, defendant sold $40 worth of methamphetamine. On June 1, 2005, a search warrant was executed at defendant's home. The search uncovered: 3 baggies of white powder substances or crystals; a digital scale; 2 spoons with drug residue; 64 grams of methamphetamine; and 10.37 grams of marijuana. Defendant was also charged with child abuse because contraband was located within three feet of the ground where children could have accessed it.

After her no contest plea, defendant's sentence as to the two felony counts was suspended, three additional counts were dismissed. Defendant was ordered to submit to anti-narcotic testing and cooperate with her probation officer in a plan for substance abuse counseling. On December 29, 2006, defendant's probation was revoked and reinstated following an admitted probation violation. Defendant was ordered to enroll in and complete a 180 day live-in program and complete community service. On October 25, 2007, defendant was remanded to custody pending a probation violation hearing.

On December 20, 2007, the probation revocation hearing was held. Deputy Probation Officer Lilith Williams testified for the prosecution. Ms. Williams supervised defendant on probation. Ms. Williams explained that defendant was instructed to telephone specific numbers each evening. Defendant was to call in order to determine whether the group "Mars" to which she was assigned was required to appear for anti-narcotic testing the following day. Defendant did appear for testing on six occasions between April and August 2007. However, defendant failed to appear for anti-narcotic testing on August 2 and 24, 2007. In addition, defendant failed to complete a live-in drug

program as directed by the trial court. Defendant had enrolled in a program known as Baby Steps but was discharged from that facility. Defendant also failed to complete a program with Substance Abuse Foundation. Ms. Williams checked the answering machine on August 1, 2007 and determined that it was functional and carried the code of "Mars."

Defendant testified that she telephoned as required prior to August 2, 2007. The recording instructed the "Early Birds" and "Sunshine" groups to test for narcotics on August 2, 2007. Defendant admitted that she did not appear for the August 27, 2007 test because the answering machine was not operating when she phoned in. Defendant was no longer participating in a substance abuse program because she was attending an outpatient program known as "Sober Living." Defendant stated she appeared before the trial court and presented a letter of completion for the Sober Living 90-day program. At that time, defendant was ordered to look for a residential program. Defendant tried to get into another residential program, but was unable to find one that would accept her five children. Defendant was found to be in violation of probation. Probation was revoked. Defendant's four-year suspended sentence was reinstated.

Defendant argues there was insufficient evidence to support her probation revocation. The California Supreme Court has found proof of a probation violation by preponderance of the evidence is sufficient to revoke probation. (*In re Eddie M.* (2003) 31 Cal.4th 480, 505-506; *People v. Rodriguez* (1990) 51 Cal.3d 437, 446; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72; *Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 60; *People v. Perez* (1994) 30 Cal.App.4th 900, 904.) We review the trial court's revocation decision for an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125 [trial court's exercise of discretion "'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice'"]; *People v. Rodriguez, supra,* 51 Cal.3d at p. 443; *People v. Jordan* (1986) 42 Cal.3d 308, 316.) A probation revocation hearing is not a trial and serves a different public interest. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 788-789; *Lucido v. Superior Court* (1990) 51

Cal.3d 335, 347; *Jones v. Superior Court, supra,* 115 Cal.App.4th at p. 60; *People v. Perez, supra,* 30 Cal.App.4th at p. 907.) In *Lucido,* our Supreme Court held: "The fundamental role and responsibility of the hearing judge in a revocation proceeding is not to determine whether the probationer is guilty or innocent of a crime, but whether a violation of the terms of probation has occurred, and if so, whether it would be appropriate to allow the probationer to continue to retain his conditional liberty. [Citation.]" (*Lucido v. Superior Court, supra*, 51 Cal.3d at p. 348; see also § 1203.2; *People v. Stanphill, supra,*170 Cal.App.4th at p. 72; *People v. Monette* (1994) 25 Cal.App.4th 1572, 1575.)

In this case, there was substantial evidence that defendant violated her probation by failing to report for anti-narcotic testing and by not completing a residential drug program. Defendant was instructed regarding the phone-in procedure for testing. In fact, she successfully complied with that program on six occasions between April and August 2007. Ms. Williams checked the answering machine on August 1, 2007, and found it was functioning and included directions for the "Mars" group, to which defendant was assigned, to report the following day for testing. Defendant was discharged for various reasons from two residential drug treatment programs. Defendant acknowledged that she was instructed by the court to find another residential program. However, defendant sought to take her five children into such a program with her. Defendant was unable to find a program willing to accept her and five children. However, it was defendant's responsibility to participate in such a program regardless of personal hardship. Moreover, the record does not reflect that defendant attempted to further advise the court of her inability to participate in a residential program. The trial court specifically found by a preponderance of the evidence that defendant violated her probation by failing to submit to testing on August 2 and 24, 2007, as required. This finding was reasonable based upon the evidence presented at the revocation hearing and was neither arbitrary nor capricious.

Following our request for further briefing, the Attorney General argues that the trial court should have imposed an additional court security fee as well as a surcharge and

penalty assessments as they relate to the $50 Health & Safety Code section 11372.5, subdivision (a) laboratory fee. The abstract of judgment should be corrected to reflect both the laboratory fee and the additional surcharge and penalty assessments. At the time defendant entered her nolo contendre plea, the trial court imposed: a $200 section 1202.4, subdivision (b) fine; a $200 section 1202.44 probation revocation fine (stayed pending probation revocation); and a $50 Health and Safety Code section 11372.5 laboratory fee. The trial court also imposed a $20 section 1465.8, subdivision (a)(1) court security fee. Following the December 20, 2007 revocation hearing, the trial court orally ordered: "$200. $20. $200. $50." It appears the trial court intended to reinstate the same fines and fees as those imposed at the time of the plea.

However, the trial court should also have orally imposed and stayed a $200 section 1202.45[1] parole revocation fee. The abstract of judgment reflects the imposition of a $200 section 1202.4, subdivision (b) fine and a $200 section 1202.45 fine, but does not indicate the imposition of either a court security fee or a $50 laboratory fee. In addition, the $50 laboratory fee was subject to the following: a section 1464, subdivision (a) $50 penalty assessment; a Government Code section 76000, subdivision (a)(1) $35 penalty assessment; a $10 section 1465.7, subdivision (a) state surcharge; and a $15 Government code section 70372, subdivision (a)(1) state court construction penalty. Thus, the total amount owed in addition to the $50 laboratory fee is $110. (See *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254-1257; *People v. Taylor* (2004) 118 Cal.App.4th 454, 456-457.) The trial court imposed only one section 1465.8, subdivision (a)(1) court security fee. The trial court should have imposed a $20 court security fee pursuant to section 1465.8, subdivision (a)(1) as to each count for which defendant was convicted. (See *People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Schoeb* (2005) 132

[1] Section 1202.45 provides, "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. . . ."

Cal.App.4th 861, 865-866.) Therefore, two section 1465.8, subdivision (a)(1) fees shall be imposed.

The judgment is modified to include the fines as set forth in the body of this opinion. Upon remittitur issuance, the clerk of the superior court is directed to prepare an amended abstract of judgment reflecting: the laboratory fee originally imposed by the trial court as well as the changes set forth above; a parole restitution fine pursuant to section 1202.45 in the amount of $200; and an additional $20 court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1). The superior court clerk is to forward a copy to the California Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.